No. 97-510

(2)

Supreme Court, U.S.
FILED
OCT 17 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DR. HARRY POWER,

Petitioner,

—vs.—

RUTGERS, THE STATE UNIVERSITY
and RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LINDA B. CELAURO
Counsel of Record
VIMAL K. SHAH
CARPENTER, BENNETT & MORRISSEY
Attorneys for Respondents Rutgers, The State University and Dean Richard Foley
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
(201) 622-7711

October 1997

32 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below properly conclude that a public university professor did not have constitutionally-protected property interests in being considered for a promotion, in meeting with students alone, and having student assistants?

2. Did the courts below properly conclude that a public university professor received constitutionally-sufficient notice and opportunity to respond to sexual harassment charges for which the discipline was neither employment termination nor suspension?

LIST OF PARTIES TO THIS PROCEEDING*

Petitioner:

DR. HARRY POWER

Respondents:

RUTGERS, THE STATE UNIVERSITY

DEAN RICHARD FOLEY

---

* The United States District Court for the District of New Jersey granted Respondent Dean Richard Foley's motion for summary judgment on all counts on the grounds of qualified immunity and qualified privilege. The Third Circuit affirmed and Petitioner Dr. Harry Power has not sought to challenge that ruling in his petition to this Court.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Facts	3
1. Sexual Harassment Complaint Against Power	3
2. Power's Response to the Sexual Harassment Complaint	5
3. Further Responses to the Sexual Harassment Complaint	9
4. Other Student Complaints About Power	10
5. Power's 1992 Promotion Denial	12
6. Faculty Complaints About Power	13
7. Discipline Imposed on Power for Sexually Harassing Maher	13

PAGE

8. Lack of Property Rights 14

9. Grievance Procedure and Power's Failure to Grieve..... 14

REASONS FOR DENYING THE WRIT..... 15

A. The Lower Courts' Decision That Power Had No Constitutionally Protectable Property Interests Impaired by the Sanctions Imposed upon Him for Sexually Harassing Maher is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case 15

1. The Lower Courts Correctly Determined That Power Had No Property Right to be Considered for a Promotion, to Meet with Students Alone, or to Have Student Assistants .. 16

2. The Lower Courts' Decision is a Fact Specific Application of the Well-Settled Precedent of this Court and Does Not Warrant this Court's Exercise of its Discretion to Grant Certiorari.... 18

3. The Second Circuit's Decision in *Ezekwo v. Health and Hospitals Corporation* Lends No Support to Power's Claim That the Benefits Impacted by the University's Discipline of Him Constitute "Property" 19

PAGE

B. The Lower Courts' Decision that Power Received All of the Process to Which He Was Due Prior to Receiving Discipline is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases PAGE

Bishop v. Wood, 426 U.S. 341 (1976) 15-17

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 15, 16, 18

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 21, 22

Driggens v. City of Oklahoma City, 954 F.2d 1511 (10th Cir.), *cert. denied*, 506 U.S. 843 (1992) 18

Dykes v. Southeastern Pa. Transp. Authority, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434 (1996) 23

Ezekwo v. Health and Hospitals Corporation, 940 F.2d 775 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991) 19, 20

Gilbert v. Homar, 520 U.S. ___, 138 L. Ed. 2d 120 (1997) 15, 22

Kovats v. Rutgers, The State University, 822 F.2d 1303 (3d Cir. 1987) 16

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 15, 18, 19

Maples v. Martin, 858 F.2d 1546 (11th Cir. 1988) 23

Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209 (11th Cir. 1995) 18

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 19

Perry v. Sindermann, 408 U.S. 593 (1972) 15, 20

PAGE

Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988), *aff'd*, 860 F.2d 1075 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989) 16

Constitutional Provision

U.S. Const., Amend. XIV (Due Process Clause) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-510

DR. HARRY POWER,

Petitioner,

—vs.—

RUTGERS, THE STATE UNIVERSITY
and RICHARD FOLEY, DEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent Rutgers, The State University, respectfully requests that this Court deny the petition for a writ of certiorari. The petition raises no "special and important reasons" for granting a writ of certiorari. Rather, the petition seeks to challenge the lower courts' correct application, to the particular facts of this case, of this Court's well-settled precedent as to what constitutes a public employee's property interest within the meaning of the Due Process Clause and what satisfies minimal due process requisites for the discipline of a public employee, that does not result in the employee's termination or suspension.

STATEMENT OF THE CASE

A. Proceedings Below

In September 1994, Dr. Harry Power, a tenured associate professor of biological sciences at the New Brunswick, New Jersey campus of Rutgers, The State University ("Rutgers"), filed a lawsuit against Rutgers and Richard Foley, the Dean of the Faculty of Arts and Sciences (FAS) at Rutgers' New Brunswick campus. In his first and second causes of action, Power alleged Rutgers and Foley deprived him of property and stigmatized his reputation without due process of law when they imposed certain restrictions upon him after concluding he had sexually harassed a female graduate student. In his third cause of action, Power alleged Rutgers breached an agreement to investigate the validity of student complaints about Power's use of sexual, sexist, and vulgar language in class, and, thereafter, to reevaluate him for promotion. In his fourth cause of action, Power alleged that Foley defamed him by communicating to several Rutgers' administrators his conclusion that Power had committed sexual harassment.

On April 12, 1996, Rutgers and Foley moved for summary judgment. Except where necessary to correct Power's incorrect recitation of the deposition testimony of the eight Rutgers' administrators and faculty he deposed (Ja 1920-1944),[1] Rutgers and Foley relied almost exclusively upon Power's deposition testimony and Power's written response to the sexual harassment complaint against him, as providing the undisputed material facts in support of their motion (Ja 40-66).

On October 1, 1996, the district court granted complete summary judgment to Rutgers and Foley, holding: (1) Power was not deprived of a constitutionally-protected property

---

[1] "Ja" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

"Pet. App." refers to the Appendix to Petitioner's Petition.

interest (Pet. App. A-13 – A-14), but even if he had been, he had received all the process due (Pet. App. A-14 – A-18); (2) reputation alone is not a constitutionally-protected liberty interest (Pet. App. A-18 – A-19), but even if it were and even if Power had been deprived of it, he had received all the process due (Pet. App. A-19); (3) Power failed to allege a breach of contract claim (Pet. App. A-19), but even if he had, the claim was barred by his failure to utilize the collectively-negotiated grievance procedure in the contract between Rutgers and his union (Pet. App. A-19 – A-20); (4) Foley's statement to other Rutgers officials that Power sexually harassed the female graduate student was true based on Power's admissions, and truth is an absolute defense to a defamation claim (Pet. App. A-20 – A-22); and (5) Foley was qualifiedly immune from the due process claims and qualifiedly privileged on the defamation claim (Pet. App. A-22 – A-23).

Power appealed to the United States Court of Appeals for the Third Circuit from the district court's October 1, 1996 Order. By Judgment Order dated June 24, 1997, the Third Circuit summarily affirmed the judgment of the district court in its entirety. (Pet. App. A-1 – A-2).

B. Facts

1. Sexual Harassment Complaint Against Power

In the fall of 1992, a female graduate student, Eileen Maher, began graduate study in New Jersey at Rutgers in its Department of Biological Sciences, Power's department. Within the first two months of her study, at which time she knew nothing about mountain bluebirds, Power suggested Maher apply for a grant to study mountain bluebirds at his study site in Montana (Ja 91-92). Power even assisted Maher in obtaining the grant by dictating her grant application (Ja 91-92). Thereafter, Maher was awarded the grant and in early May 1993, she and Power went to Montana (Ja 104).

Maher's field research was to have lasted two-and-a-half months. After only five-and-a-half weeks, however, Maher abandoned her research and fled Montana to escape Power's repeated acts of sexual harassment and retaliation (Ja 104, 519). So fearful was Maher of Power, that during her last several days in Montana, she stayed in the home of the family whose cabin she was renting, rather than the cabin itself, until her father could arrive and accompany her home (Ja 380-381, 1905-1906).

In late June of 1993, as soon as Power learned Maher had left Montana, he wrote to his Graduate Program Director Thomas Meagher and Department Vice Chair Emmett Dennis, preemptively denying that he had committed sexual harassment. In his letter, Power stated that any forthcoming accusation Maher might make along those lines were the result of her being delusional. He further theorized that such delusions might stem from Maher possibly having a brain tumor, her exposure to toxins, or paranoid schizophrenia (Ja 337-338).

In September 1993, after speaking with University administrators regarding Rutgers' sexual harassment policy, Maher submitted an eigh-page sexual harassment complaint (Ja 375-382) to Graduate School Associate Dean Barbara Bender. Bender is the person designated by the sexual harassment policy to receive complaints of graduate students (Ja 382, 141 ¶ 1, 145, 1814-1815).

In her complaint, Maher alleged that while in Montana, Power had subjected her to repeated unwelcome touchings and sexually-related comments, including: coming to her cabin, denigrating her boyfriend, and expressing his own interest in her (Ja 376); retaliating against her after she told Power that she was happy with her boyfriend and not interested in Power (Ja 378-380); showing her a pair of high delivery obstetrical forceps and telling her he would use them on her if she were not a "good girl" (Ja 376); brushing the hair from her face (Ja 376); asking her to make him cookies,

and threatening to spank her if she failed to do so (Ja 377); asking her to ride in the child's seat of a grocery cart (Ja 377); threatening to jump on her to slow her down and keep her from walking ahead of him (Ja 377); threatening to place her on a leash made of black leather and silver studs (Ja 377); lifting up the back of her shirt while she was climbing a pole (Ja 377); pinning her against a bench by placing the front of his body in contact with her back (Ja 378); running his finger down her back and asking her what her bra size was (Ja 376); and responding to her pleas to "control himself" by telling her, "Well, it's not as if I have thrown you up against the wall and felt you up, but I want to" (Ja 377).

Pursuant to Rutgers' sexual harassment policy, Bender forwarded Maher's complaint to the FAS Dean's Office for resolution (Ja 141 ¶ 3, 383). Karen Stubaus, the FAS Associate Dean for Administration and Personnel, immediately forwarded the complaint to Power for response (Ja 383).

2. Power's Response to the Sexual Harassment Complaint

In October 1993, Power submitted a 148-page response (55 pages of single-spaced typewritten text and 11 multi-page appendices), to Maher's eight-page complaint (Ja 384 to 531). Although Power denied that he had engaged in sexual harassment, he admitted much of the conduct of which Maher complained.[2]

---

[2] Power's failure to seek review here of the lower courts' conclusion that Power had sexually harassed Maher as a matter of law, and therefore Foley's statement to that effect was true (Pet. App. A-20-A-22), essentially means that Power no longer disputes that he engaged in sexual harassment. At bottom, therefore, Power's petition is simply a technical argument as to whether he was disciplined for only that misconduct, or whether other acts of his misconduct entered into the discipline decision. (Petition at 19-20). Before the Court may even consider this "notice" argument, however, it must first accept Power's argument that the discipline he received for engaging in sexual harassment, the suspension of certain non-wage benefits, affected constitutionally-protected

Power admitted that soon after her arrival in Montana, he had gone to Maher's cabin to ascertain whether she had any romantic interest in him. In the course of this discussion, he disparaged Maher's boyfriend, and told her of his interest in finding a wife (Ja 390-396):

> We talked about her boyfriend because, as she notes in her complaint, she kept bringing him up, apparently as a foil to what she perceived as my approaching her about having a romantic relationship. There's some truth in her perception of what I was doing. . . . *I was definately [sic] interested in whether she had any romantic interest in me* . . .
>
> We were both effectively "high" (in a behavioral, not a drug, sense) for those preceding 5 days. We were intensely enthusiastic about being in Montana . . . . *This led me to want to know what fraction of her enthusiasm pertained to me personally.* After all, men my age (48) have been marrying women her age (26) for tens of thousands of years . . . .
>
> Hence, I asked in a round-about way whether she had any interest in me. . . .

(Ja 391) (emphasis in original). Maher informed Power she was not romantically interested in him (Ja 391). According to Power's response, from that point forward, he "felt a deep sense of revulsion and disgust toward her" (Ja 395):

> I knew as of that moment (i) that I wanted nothing whatsoever to do with her (be it professional or social), (ii) that I regretted having brought her out to Montana and having indirectly asked whether she had any romantic interest in me . . . .

"property" interests such that due process notice and hearing requirements arose. (Petition at 12-19). As demonstrated herein, Power cannot prevail on either argument, much less both.

(Ja 395-396).[3]

Power also admitted: showing her a pair of high delivery obstetrical forceps, and did not deny that he told her he would use them on her if she were not a "good girl" (Ja 376, 388, 488-89); brushing "the hair out of [Maher's] face 1-3 times in the first week or 2 of the field season" (Ja 396); asking "her to make cookies for *us*, cookies that *we* could share" (Ja 398) (emphasis in original); asking Maher if she wanted to ride in the child's seat of a grocery cart (Ja 377, 400); asking Maher "if the only way I could get her to walk next to me in the field was to jump on her and hold her down" (Ja 401); asking "her if I had to put a leash and collar on her in order to get her to walk at a correct distance" (Ja 401);[4] "grab[bing] her but-

---

[3] Contrary to Petitioner's suggestion (Pet. App. n. 2), the district court did not rely on misleadingly selected excerpts of Power's deposition testimony when it concluded that Power began his relationship with Maher for personal reasons, and thereafter, wanted to discontinue the professional relationship after she informed him she was happy with her boyfriend and not interested in him. Furthermore, Petitioner's statement that Power testified that he wanted to continue the professional relationship (*Id.*), is simply wrong.

> Q. Did you leave that conversation that day thinking she was or wasn't romantically interested in you?
>
> A. I left the conversation thinking that she was not romantically interested in me, and I regretted ever having anything to do with her.
>
> * * *
>
> Q. Don't you state in your reply starting on Page 12, among other things, you state, "[I] knew as of that moment . . . that I wanted nothing whatsoever to do with her, be it professional or social"?
>
> A. Yes. That's my view. I did not wish to continue a professional relationship. However, I was in a situation where I could not easily end it.

(Ja 125).

[4] Power denied only Maher's statement that the leash of which he spoke was "black leather" with "silver studs" (Ja 401, 377).

tocks" while Maher was climbing a pole and as she descended "her open jacket began to slip over my head and the untucked tail of her shirt brushed across my face" (Ja 404); and "brush[ing] against her" while "very excited" (Ja 408-409).

Although in his response, Power denied Maher's accusation that he had asked her about her bra size, he explained:

> I believe she is confusing her bra size with mine.

(Ja 388); and

> Why would I be interested in asking her for her bra size when I had her freshly laundered bras in my hands on a weekly basis?

(Ja 389).

Power also admitted that Maher had objected to his behavior and had pleaded with him to "control himself", and that his response to her was "to the effect that it was not as though she never has been manhandled. What was her problem?" (Ja 108). Power also admitted that when Maher accused Power of making sexual advances, he indignantly replied, "you have nothing to complain about, it's not as if I've thrown you up against a wall and felt you up" (Ja 405). As to the last remark, Power explained:

> The image I stated about throwing her up against the wall and feeling her up was one that I have carried since high school when I saw exactly that done to a girl by her boyfriend after she had taunted and humiliated him in front of his friends for about an hour. He did it to dominate her thoroughly and publicly, and it worked, i.e., she began to enjoy it after a few seconds of struggle and was polite to him for the rest of the evening (this occurred at a high school dance; I was one of about a dozen spectators). I have often thought that this girl deliberately provoked her boyfriend in public to stimulate exactly the response she got. (There was a lot of exhibitionism in

> her behavior; she was a cheerleader and the prettiest girl in my graduating class, and he was a star athlete; she made sure they were the star attraction of the evening by her behavior).
>
> Sometimes during the summer I wondered if Eileen was similarly provoking me, i.e., some women deliberately provoke men to see how much they can get away with just as children often provoke their parents to test the limits.

(Ja 405).

3. Further Responses to the Sexual Harassment Complaint

Despite Power's self-incriminating response which Dean Foley and his associate deans Noemie Koller and Karen Stubaus read, and properly read, as a confession of acts of sexual harassment and retaliation,[5] Foley and his staff met with Power and his union representative on March 28, 1994,[6] to give him an additional opportunity to respond to Maher's allegations (Ja 114).

At this meeting, Power supplemented his earlier 148-page response through: his purported recounting of an opinion of a forensic psychiatrist that Maher should undergo an electroencephalogram because her sexual harassment claims may have stemmed from an odd temporal lobe form of epilepsy or a borderline personality disorder (Ja 120-123, 538-539); maps

---

[5] Dean Foley and Associate Dean Koller testified the conclusion of sexual harassment was based largely on Power's express admissions and lack of denials of acts alleged as set forth in Power's response (Ja 990-1034, 1656-1667, 1671-1672). Similarly, Associate Dean Stubaus testified "Dr. Power's reply . . . was a major factor in our conclusion that Professor Harry Power had an inappropriately sexual attitude towards or—or orientation towards this graduate student" (Ja 1349).

[6] The meeting originally scheduled for November 22, 1993, was repeatedly delayed by Power (Ja 532-536, 111-114).

and photographs of Montana, news articles, and an issue of the *TV Guide* to support his theory that Maher's sexual harassment claims may have stemmed from stress caused by isolation and the weather (Ja 121, 537-539); and an "aerosol can of concentrated capsicum" (a wild animal repellant), to demonstrate that Maher could have defended herself against his physical assaults (Ja 539).

At the conclusion of the meeting, Dean Foley gave Power another opportunity to respond to Maher's complaint, by inviting him to submit additional documentation. Power availed himself of this opportunity and submitted a 40-page document consisting of a memorandum with appendices on March 31, 1994 (Ja 537-577).

4. Other Student Complaints About Power

During the 20 years Power has taught at Rutgers, students, in written evaluations, have regularly complained about Power's repeated use of sexual, vulgar, and sexist comments in class, *e.g.*:

> His language (fuck, goddamn, son-of-a-bitch, etc.) is most unnecessary.

(Ja 198).

> Fou[l] language offends me, especially when it isn't necessary.

(Ja 206).

> . . . arrogant, sarcastic, rude and sexist . . .

(Ja 206).

> His use of colloquial, rather crude words and phrases was unnecessary, unappreciated, and inappropriate.

(Ja 208).

> Sexist comments, chavaunistic [sic] . . . .

(Ja 210).

> . . . highly non-professional language. . . . His views and studies of women are obviously secondary. . . . a reference to a "feminist stage" . . .

(Ja 211).

> I really do not appreciate the perverted remarks given by Dr. Power in references to "getting laid"

(Ja 253).

> Dr. Power is not very professional with his many references to sex

(Ja 254).

> Out of all the lectures he had given, there was only one lecture that he did not say one sexual comment. His comments ranged from him wanting to have sex with every female in the room to the size of his genitals.

(Ja 254).

> I don't like his vulgar manner either.

(Ja 255). These student evaluations form a part of Power's personnel file. (Ja 36 ¶ 7).

In response to an inquiry by Associate Dean Koller about some of these comments, Power did not deny that he had remarked upon the size of his genitals in class. Rather, Power defended the comment as relevant to the course material (Ja 907-908, 928-929). In response to another inquiry regarding Power's classroom comments from Foley's predecessor Dean McCormick to Power's department chair David Denhardt, Denhardt assured McCormick that the department had investigated Power's classroom remarks and considered them to be "an unfortunate incident" and that "Harry has learned a lesson and will be more circumspect in the future" (Ja 217-218, 584).

5. Power's 1992 Promotion Denial

Partly because of concerns about Power's classroom use of sexual and other inappropriate language, and partly because of concerns about his publication rate and teaching effectiveness, Power was denied promotion to the rank of professor in 1992 (Ja 216).

Pursuant to the tenure and promotion provisions of the collectively-negotiated agreement (Agreement) between Rutgers and the Rutgers Council of AAUP Chapters (AAUP), the union which represents Rutgers faculty, Power grieved the denial of his promotion (Ja 101, 162, 284-305). In March 1993, the Grievance Committee, a tribunal of faculty members designated by the Agreement to resolve grievances arising out of the promotion process, rejected eleven of the twelve bases Power had advanced in support of his grievance (Ja 173 ¶ F.2.a, 309-334). However, the Grievance Committee found that the student comments regarding Power's repeated use of vulgar and sexually explicit comments in class had infected Power's promotion proceedings without a definitive judgment having been made as to their validity (Ja 316).

On April 30, 1993, to implement the Grievance Committee's decision, Rutgers and Power agreed that Power's dean, Foley, along with Power's department chair, Denhardt, would undertake a "full inquiry of the student complaints," and thereafter prepare a formal report to be included in Power's promotion packet when his credentials were to be reevaluated in the future (Ja 335-336). This agreement (the "remand agreement") set no time period for completing the report or conducting the reevaluation (Ja 335-336).

Before this inquiry, report, and reevaluation were implemented, the FAS dean's office became aware of Maher's sexual harassment complaint, and, in consultation with Rutgers' Assistant Vice President for Faculty Affairs,

> . . . determined that the public interest had to be paramount in this case and that the university could not be in a position of putting forward for promotion someone who had an open charge of sexual harassment, and that we should hold off beginning the remand.

(Ja 1314).

6. Faculty Complaints About Power

Independent of the March 28 meeting with Power about the sexual harassment complaint, on March 29, 1994, Associate Deans Koller and Stubaus met with the current and former directors of the ecology graduate program, Joanna Burger and Thomas Meagher, to address

> [A] separate concern which had been voiced to Noemie Koller by Joanna Burger . . . and perhaps other faculty members in the Department of Biological Sciences being physically afraid of Harry Power and wanting the dean's office to do something about it.

(Ja 1372-1376). Additionally, Meagher and Burger shared their knowledge relevant to Maher's sexual harassment complaint against Power. Burger added that Power had told her "that the only thing he had done was suggested they [Power and Maher] might have a dating relationship, and that he had told [Maher] one time that she should walk sufficiently close to hold hands" (Ja 1056).

7. Discipline Imposed on Power for Sexually Harassing Maher

By letter of May 16, 1994, Dean Foley advised Power that he had determined that Power had sexually harassed Maher and informed Power of the restrictions Dean Foley was imposing: Power was prohibited from meeting alone with students for three years; Power was prohibited from having teaching or research assistants for three years; and Power

could not be evaluated for promotion for three years (Ja 578-579).

By a separate May 16, 1994 letter which Dean Foley sent only to Graduate School Associate Dean Bender, Foley gave a more detailed report of how he had resolved the Maher complaint against Power (Ja 593-607). In addition to referring to the numerous admissions Power had made in his written response to the complaint (Ja 601-603), Foley also referred to the student comments about Power's classroom use of vulgarities, that are contained in Power's personnel file which he and his staff reviewed in resolution of the Maher complaint (Ja 605-606, 36 ¶ 7). Foley also noted to Bender that he was disturbed by reports from Power's faculty colleagues in the Biological Sciences Department about their perception of Power as a potentially violent person (Ja 606).

8. Lack of Property Rights

By Power's own admission, no written document confers upon him a "right" to meet with students alone, to have research or teaching assistants, to make inappropriate remarks in class, not to be disciplined, or to be promoted (Ja 81-82).

9. Grievance Procedure and Power's Failure to Grieve

The Rutgers-AAUP Agreement sets forth a detailed grievance and arbitration procedure by which faculty may contest disciplines imposed upon them (Ja 154). At Step One of the procedure, the grievant may be assisted by two AAUP representatives (Ja 158 ¶ D.6). A grievant may, thereafter, appeal a denial of his grievance at Step One to neutral arbitration, at which the grievant may be represented by counsel, present witnesses, and cross examine witnesses against him (Ja 158-159 ¶¶ E.1-E.10, 39 ¶ 4).

Power considered, but decided not to file, a grievance challenging either the discipline for sexual harassment or the fact

that the remanded evaluation had not taken place (Ja 98, 103, 124). Power made this decision not to file a grievance after consultation with his attorney and his union representative (Ja 98, 103, 124).

REASONS FOR DENYING THE WRIT

A. The Lower Courts' Decision That Power Had No Constitutionally Protectable Property Interests Impaired by the Sanctions Imposed upon Him for Sexually Harassing Maher, is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case.

This Court has long held that "[t]he hallmark of property . . . is an individual entitlement grounded upon state law. . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Absent a clear demonstration that an interest is recognized as "property" under state law, no due process issue arises. *See Bishop v. Wood*, 426 U.S. 341, 345-46 (1976). Even then, only certain "substantial" interests rise to the level of property interests protected by the procedural due process guarantees of the Fourteenth Amendment.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives. . . .

Roth, 408 U.S. at 577; *see also Logan*, 455 U.S. at 430-30 (discussing the substantial nature of the right to bring discrimination law claims).[7] As this Court emphasized in *Roth*:

---

[7] Indeed, in the employment context, this Court has recognized as constitutionally-protected property interests only those types of employment which are terminable only for cause. *See Roth*, 408 U.S. at 578; *Perry v. Sindermann*, 408 U.S. 593 (1972); *cf. Gilbert v. Homar*, 520 U.S. __, 138 L. Ed. 2d 120, 126 (1997) (Court assumed, without deciding, that suspension without pay of a tenured public employee constituted the

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .

408 U.S. at 577. As demonstrated herein, the lower courts correctly determined that none of Power's asserted interests rose to the level of a constitutionally protected property interest.

1. The Lower Courts Correctly Determined That Power Had No Property Right to be Considered for a Promotion, or to Meet with Students Alone or Have Student Assistants.

Relying on earlier precedent from the United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey, which had interpreted New Jersey law to hold that Rutgers' tenure and promotion procedures do not create property interests, the lower courts held that Power did not have a constitutionally-protected property right in the opportunity to be considered for a promotion under those procedures. (Pet. App. A-13—District Court Opinion citing *Kovats v. Rutgers, The State University*, 822 F.2d 1303 (3d Cir. 1987); *Varma v. Bloustein*, 721 F. Supp. 66 (D.N.J. 1988), *aff'd*, 860 F.2d 1075 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989)). Rather, the lower courts held that Power's interest in being considered for a promotion amounted to an "abstract type of unilateral expectation" which this Court has held does not rise to the level of constitutionally-protected "property." (Pet. App. A-13).

The lower court's analysis and determination was entirely consistent with this Court's prior decision in *Bishop*. At issue

---

deprivation of a property interest for the purpose of determining due process supplied in any event). The discipline Power seeks to challenge here involves neither the discharge of his employment nor the suspension of his pay.

there was a claim by a discharged public employee in North Carolina that a city ordinance, which set forth the reasons for which city employees could be dismissed, created a property right which entitled him to due process protections prior to his discharge. In holding against the employee, this Court relied on the interpretation of the ordinance by a United States District Judge in North Carolina, that the ordinance did not create a property interest in employment.

> In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of the particular states unless their conclusions are shown to be unreasonable. . . On such questions we pay great deference to the views of judges of those courts 'who are familiar with the intricacies and trends of local practice.'

Bishop, 426 U.S. 341, 345-46 n. 10 (citations omitted). As Power's claim to be "considered for a promotion" has less of a connection to Rutgers' tenure and promotion process than the claim for employment had to the dismissal ordinance at issue in *Bishop*, the lower courts' decision that Power's claim does not amount to a property right, is entitled to even greater deference. In any event, Power has pointed to no record evidence demonstrating that his interest in being considered for promotion is a recognized property right under state law.[8]

Power has also pointed to no record evidence that state law recognizes that there exists a "mutually explicit understand-

---

[8] Power's claim that the lower courts failed to consider his argument that the remand agreement created a property right, is incorrect. (Petition at 14-15). That agreement, which arose out of the grievance process of Rutgers' tenure and promotion procedures, stated that Power would be re-evaluated for promotion after the University investigated the validity of student comments concerning Power's repeated use of vulgar and sexual remarks in the classroom (Ja 335-36). Thus, the lower courts' decision that Power did not have a property interest in being considered for promotion subsumed Power's argument that the agreement for re-evaluation after an investigation created a property right.

ing" that support a "legitimate claim of entitlement" to meet with students alone and to have student assistants. *Roth*, 408 U.S. at 577. On the contrary, Power admitted that no written document or contract confers upon him a "right" to these benefits (Ja 81-82). Power's reliance on an inference from an isolated statement by Dean Foley concerning the "customary duties of a faculty member" is plainly an insufficient basis for challenging the lower courts' determination that Power has no property right to meet with students alone and to have student assistants. *Roth*, 408 U.S. at 578 n. 16 (fact that the University reappointed a vast majority of faculty, was insufficient to create a "common law of re-employment" to support a property right).[9]

2. The Lower Courts' Decision is a Fact Specific Application of the Well-Settled Precedent of this Court and Does Not Warrant this Court's Exercise of its Discretion to Grant Certiorari.

Power's argument in Point II, § A of his petition that "this Court has not squarely addressed whether certain mutual understandings may predicate a legally-cognizable claim" is misguided for several reasons. (Petition at 16-17).

Power's argument wrongly assumes that for any of the benefits to which he claims he was entitled, there exists record evidence that rises to the requisite level of "rules or understandings that secure benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Further,

---

[9] In several places in his petition, Power invokes the incorrect legal standard, by asserting that a "rational factfinder" could have concluded that his claimed interests rose to the level of constitutionally protected property. (Petition at 14, 15). The issue of what is "property" is a legal, not a factual, issue that must be determined by reference to state law. *See Logan*, 455 U.S. at 430; *Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209, 1212 n. 3 (11th Cir. 1995) (error for district court to submit to jury the legal issue of whether a policy created a property interest); *Driggens v. City of Oklahoma City*, 954 F.2d 1511, 1513 (10th Cir.), *cert. denied*, 506 U.S. 843 (1992) (same).

Power's argument ignores that such determinations must be made by reference to state law. *Logan*, 455 U.S. at 430 ("property" determinations are grounded upon state law). As discussed above, the lower courts correctly decided there was no record evidence to suggest that state law recognizes Power's entitlement to be considered for a promotion, to meet with students alone, or to have student assistants.

Finally, Power's argument wrongly assumes that this Court's failure to "squarely address" whether his specific claimed entitlements rise to the level of "a legally-cognizable property interest," warrants a grant of certiorari. This Court has made clear that "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public *as distinguished from that of the parties*. . . .' " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (citations omitted) (emphasis added).

3. The Second Circuit's Decision in *Ezekwo v. Health and Hospitals Corporation* Lends No Support to Power's Claim That the Benefits Impacted by the University's Discipline of Him, Constitute "Property".

As demonstrated above, the lower courts, applying the well-settled holdings of this Court, correctly concluded that Power had failed to show that his interests in being considered for a promotion, meeting with students alone, and having student assistants, were recognized by state law as "property". In Point II, § B of his Petition, under the guise of claiming a "split" in the decisions of the circuit courts (Petition at 17-19), Power relies on a single case from the United States Court of Appeals of the Second Circuit, *Ezekwo v. Health and Hospitals Corporation*, 940 F.2d 775 (2d Cir.), *cert. denied*, 502 U.S. 1013 (1991). As demonstrated herein, however, that case lends no support to Power's claims.

In *Ezekwo*, the Second Circuit held that a hospital's long-established and documented practice of rotating its residents into the position of Chief Resident, and its specific advice to Ezekwo that she would also be rotated into that position, created a property interest under state law. *Ezekwo*, 940 F.2d at 782-83. The Chief Resident position carried with it additional job responsibilities, an increase in salary and greater prestige. *Id.* at 777. In finding a property interest, the Second Circuit emphasized that the record, including hospital brochures, demonstrated that the hospital's rotation plan was an "established practice." *Id.* at 782. It also emphasized that the hospital's failure to rotate Ezekwo into the position of Chief Resident "was not the result of routine discipline." *Id.*

Unlike Ezekwo who cited to documentary and testimonial evidence that clearly established the rotation practice she claimed, Power failed to cite to any record evidence that confers upon him a "right" to meet with students alone or to have student assistants. Also unlike Ezekwo, who had demonstrated an established right to a definite position, Power merely claims a right to be "considered for a promotion." A right to a definite position has been recognized as a constitutionally-protected property interest (*see Perry*, 408 U.S. at 603 (right to professorship)), while Power's claimed right is merely an "abstract type of unilateral expectation" which does not rise to that level. (Pet. App. A-13). Finally, unlike the denial to Ezekwo of the Chief Resident position, the suspension of some of Power's benefits *was* the result of routine discipline.

B. The Lower Courts' Decision That Power Received All of the Process to Which He Was Due Prior to Receiving Discipline, is a Correct Application of the Well-Settled Decisions of this Court to the Specific Facts of this Case.

This Court has held that before terminating the employment of a public employee having a property interest in his or her

job, the employer need only provide the employee with "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

Here, university professor Power was charged with, and disciplined for, sexual harassment of student Maher. As to this charge, the record amply supports the lower courts' decision that Power had substantial notice and multiple opportunities to respond, and Power does not contend otherwise. (*See* Pet. App. A-16 – A-18; Ja 375-82, 384-531, 537-77).

Nevertheless, Power argues that he was denied due process because he contends that Foley based the discipline on charges of which Power purportedly had no notice. (Petition at 19-20). Power bases his assertion on Foley's reference in his separate report to Associate Dean Bender, to student course evaluations describing inappropriate sexual remarks made by Power in classes and allegations made by department colleagues on March 29, 1994 that Power was a violent person who regularly made sexually inappropriate comments (Ja 606).

However, the record evidence makes clear that Power was disciplined only for sexually harassing Maher, and that other allegations of Power's misconduct had no effect on the discipline. Foley's May 16, 1994 letter to Power refers to no incident other than Power's sexual harassment of Maher, and thereafter, lists the discipline imposed for that offense. (Ja 578). Furthermore, the precise discipline set forth in that May 16, 1994 letter to Power was discussed on March 28, 1994, by Dean Foley with his Associate Deans, Stubaus and Koller, following their meeting with Harry Power that day (Ja 1216-1220, 1226-1230, 586-592). Further still, as of March 28, 1994, the three deans had no doubt that Dr. Power had sexually harassed Eileen Maher, no doubt that discipline would be imposed, and no doubt as to the precise nature of that disci-

pline (*Id.*). Indeed, during the March 28, 1994 meeting, Stubaus drafted the sanctions, which, except for specific time periods and other minor details, were identical to the sanctions Foley imposed on Power in his May 16 letter (Ja 588).

In any event, the decisions of this Court make clear that, at the pre-termination stage, an employer need not present an employee with every bit of evidence that forms the basis of the charge. This Court held in *Loudermill* that the pre-termination requirements' purpose is to "be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S. at 545-46. As this purpose can be satisfied short of presenting every bit of evidence supporting the charge, it follows that not every bit of evidence need be presented at the pre-termination stage. Indeed, this Court recently held that where there are reasonable grounds to believe that the charges against the employee are true, an employer need not provide *any* notice or opportunity to be heard prior to imposing a discipline short of discharge. *Gilbert v. Homar*, 520 U.S. __, 138 L. Ed. 2d 120, 128 (1997) (arrest of police officer provided adequate ground to believe the charges were true and supported suspension without pay, prior to any notice or hearing). It follows that in the circumstances of this case, where Power's own response to Maher's sexual harassment complaint reasonably caused University officials to believe Maher's allegations were true, no further notice to Power was required before the University imposed the non-termination discipline on him. Accordingly, any purported failure to apprise Power of other incidents of misconduct did not violate any due process rights to which he was entitled.

This Court's further holding in *Loudermill*, that the presence and nature of post-termination proceedings permit lesser pre-termination proceedings (470 U.S. at 545), further suggests that where an adequate post-termination procedure

exists, an employer need not present the employee with all of the evidence at the pre-termination stage. Here, Power had available to him, but chose not to utilize, the grievance procedure of the Rutgers-AAUP Agreement to challenge what he perceived to be the "unjust discipline" Foley had imposed on him (Ja 98, 103, 124). That procedure ends in neutral arbitration, at which the parties are permitted to be represented by counsel, present witnesses, and cross examine witnesses against them (Ja 158-159 ¶¶ E.1-E.10, 39 ¶ 4). The availability of this undeniably constitutionally-sufficient post-discipline process, therefore, further undermines Power's assertion of a due process violation. *See Dykes v. Southeastern Pa. Transp. Authority*, 68 F.3d 1564, 1572 and 1572 n.6 (3d Cir. 1995) ("In so holding, we reconfirm our agreement with the many courts holding that the grievance procedures outlined in collective bargaining agreements can satisfy due process requirements."), *cert. denied*, 116 S. Ct. 1434 (1996); *Maples v. Martin*, 858 F.2d 1546, 1550-51 (11th Cir. 1988) (no due process violation when plaintiffs, tenured faculty members, were afforded notice of charges and an opportunity to be heard, and a constitutionally sufficient grievance-arbitration process was available to them).

In sum, assuming that Power had property interests in the benefits impaired by the sanctions Foley imposed on him (which he did not), and even if Power did not receive notice of all of the evidence against him prior to the issuance of the sanctions, he still received all the process to which he was due.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LINDA B. CELAURO
Counsel of Record
VIMAL K. SHAH
CARPENTER, BENNETT & MORRISSEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
(201) 622-7711

Attorneys for Respondents
Rutgers, The State University
and Dean Richard Foley

October 1997